SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1806

REID SMITH, *Petitioner*

v.

ROGERS C. B. MORTON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, Reid Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 1, 1974.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, not reported, appears as Appendix A hereto. No formal opinion was rendered by the United States District Court for the District of Arizona, but the Judgment of the District Court

granting the Secretary of Interior's motion for summary judgment and dismissing the action on the merits is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 1, 1974. On April 17, 1974, Petitioner made application for an extension of time within which to file his petition for a writ of certiorari. By Order of Mr. Justice Douglas entered April 18, 1974 (No. A-975) the time within which Petitioner might file his petition for writ for certiorari was extended for 30 days to and including June 1, 1974. This petition is filed prior to that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Interior and the courts below properly applied the tests for determining the validity of mining claims on federal lands.

2. Whether a mining claim, validly located and profitably operated in the past, still containing minerals of the quality and quantity mined profitably in the past, becomes invalid because of failure of the market, brought about by the importation of similar minerals at low prices.

3. Whether the validity of a mining claim fluctuates with the market price of the mineral for which the claim was located.

4. If so, whether the validity of these claims will be restored with a future market price increase which would render production profitable.

STATUTORY PROVISIONS INVOLVED

United States Code Title 30:

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

§ 29. Patents; procurement procedure; filing; application under oath, plat and field notes, notices, and affidavits; posting plat and notice on claim; publication and posting notice in office; certificate; adverse claims; payment per acre; objections; non-resident claimant's agent for execution of application and affidavits

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter and sections 71 to 76 of this title, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter and sections 71 to 76 of this title, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Chief Cadastral Engineer, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on

the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The manager of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the Manager of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with

the terms of this chapter and sections 71 to 76 of this title. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

STATEMENT

In March of 1961, Petitioner filed an application for patent under 30 U.S.C. § 29 to sixteen mining claims in the Long Valley Mining District of Arizona alleging a discovery of valuable mineral deposits in the form of manganese. Manganese is essential in the manufacture of steel, and domestic production of manganese has been highly profitable in the past. At present, most manganese is imported from African and South American countries, and domestic production is currently limited.

In February of 1962, the Bureau of Land Management, acting at the request of the Forest Service, U.S. Department of Agriculture, filed a complaint contesting all sixteen of petitioner's claims, alleging that a valid discovery of minerals did not exist within the limits of the claims and that the land embraced within the limits of the claims was not mineral in character.

In July of 1962, hearings on the application and contest were held by a Department of Interior Hearing Examiner. In the hearing, there was no dispute that manganese was present on all sixteen claims, that manganese had been successfully mined in the past in this area, or that other manganese claims in the same

district had been patented. The geologist testifying for the Forest Service recommended that Petitioner retain ownership of the manganese deposits until the market price rose. In February 1963, the Hearing Examiner rendered his decision finding that Petitioner had made a valid discovery on each of the sixteen claims and dismissed the contest accordingly.

The Forest Service appealed the Department of Interior's Hearing Examiner's decision to the Director, Bureau of Land Management, who in October 1963 affirmed the earlier decision and found that, although the deposits could not be profitably mined at that time, they were valuable and might well be profitably mined in the future.

The Forest Service appealed the decision of the Director, Bureau of Land Management to the Secretary of Interior, where Petitioner's case was consolidated with four others for purposes of appeal. In April 1964, the Deputy Solicitor, Department of Interior, pursuant to authority delegated by the Secretary of Interior, reversed the decision of the Hearing Examiner as affirmed by the Director of the Bureau of Land Management. The Deputy Solicitor found that the present market for domestically mined manganese was depressed due to large imports and that the contested claims were null and void for lack of a present discovery of valuable mineral deposits due to changed economic conditions. *United States* v. *Reid Smith, sub. nom. United States v. Denison,* 71 I.D. 144 (1964), attached as Appendix C hereto. Petitioner moved for reconsideration, which was denied.

In March 1966, Petitioner sued the Secretary of Interior in the United States District Court for the

District of Arizona asking that court to set aside the Secretary's decision and to enter orders declaring Petitioner's mining claims to be valid and directing the Secretary of Interior to issue patents on such claims accordingly. On cross-motions for summary judgment, the District Court on January 31, 1972 granted the motion of the Secretary of Interior and dismissed the case. Appendix B hereto.

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Ninth Circuit. Briefs were filed and oral argument was heard on this appeal. By Order dated February 1, 1974, Appendix A hereto, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment "for the reasons stated in *United States* v. *Reid Smith, sub. nom. United States* v. *Denison,* 71 I.D. 144 (1964)." In support of this Order the court also cited a portion of one of its earlier decisions, *Barrows* v. *Hickel,* 447 F.2d 80 (9th Cir. 1971), a case involving a sand and gravel claim, not a metallic mineral claim.

REASONS FOR GRANTING THE WRIT

In affirming the decision of the District Court and the Secretary of Interior, the United States Court of Appeals for the Ninth Circuit, in our view, has ignored and thereby effectively extended improperly this Court's decision in *United States* v. *Coleman,* 390 U.S. 599 (1968). Further, the Court of Appeals' decision has not only damaged Petitioner, but also sanctioned a test of validity of mineral discovery which is contrary to the intent and purposes of Federal mining legislation and is inimical to the best interests of this country.

I. THE DECISION BELOW HAS IGNORED A DECISION OF THIS COURT AS TO THE PROPER TEST FOR VALID DISCOVERY OF MINERAL DEPOSITS.

The need for this Court's review of this case is most clearly evidenced by the import of the decision below which effectively extends to metallic mineral deposits the test approved by this Court for the determination of whether there has been a discovery of nonmetallic minerals of widespread occurrence.

The Act of May 10, 1972, 17 Stat. 91, 30 U.S.C. 22, *et seq.*, which this Court has found to be the "cornerstone of federal legislation dealing with mineral lands", *Cameron* v. *United States,* 252 U.S. 450, 460 (1920), provides that persons may enter upon and explore the public lands of the United States, and if they find "valuable mineral deposits", they may obtain title to the land upon which the deposits are located by application for patent to the Secretary of Interior. If the applicant can successfully show that a valid discovery of a valuable mineral deposit has been made, he will be granted a patent on the land claimed. 30 U.S.C. § 29. The long-recognized policy and purpose behind such legislation permitting United States citizens to explore and occupy public lands had been the encouragement of the development of the country's mineral resources. *United States* v, *Coleman, supra,* at 602; *Heydenfeldt* v. *Daney,* 93 U.S. 634 (1877).

The Secretary of Interior is responsible for determining whether a valid discovery has, in fact, been made and at an early date developed the so-called "prudent-man test" which requires that in order to qualify as "valuable mineral deposits", discovered deposits must be of such a character that "a person of ordinary prudence would be justified in the further

expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . ." *Castle* v. *Womble,* 19 L.D. 454, 457 (1894). This Court has approved the prudent-man test on numerous occasions. See, *e.g., Chrisman* v. *Miller,* 197 U.S. 313, 322 (1905); *Cameron* v. *United States, supra* at 459, *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 335-336 (1963).

Recently this Court again approved the use of the prudent-man test and supported the Secretary's use of a "marketability test" as a complement to and a refinement of the prudent-man test in cases where the deposits in question consisted of nonmetallic minerals of widespread occurrence. *United States* v. *Coleman, supra.* In that case, the deposits in dispute were quartzite which this Court called one of the most common of all solid materials and found to be a "common variety of stone" which could not be considered a "valuable mineral deposit" by virtue of its exclusion from such term by 30 U.S.C. § 611.

The marketability test asks whether or not the deposits in question can be mined at a profit. This Court concluded the test was a useful adjunct to the prudent-man test in cases of nonmetallic minerals of widespread occurrence. The marketability test had the additional advantage of throwing light on the claimant's true intention in seeking a patent. In *Coleman,* the claimant had built a house on his claim and, given the fact that he could not profitably mine the quartzite, his intention appeared to be to homestead the land rather than to mine it.[1]

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[1] The record in this case is devoid of any indication that Petitioner has any intention other than to mine the sixteen claims in issue.

The United States Court of Appeals for the Ninth Circuit in this case, however, has adopted the marketability test not only for nonmetallic minerals of widespread occurrence, but also for all minerals, including essential, metallic minerals. Moreover, it has approved the Secretary of Interior's application of the marketability test not as a complement to the prudent-man test, but as a replacement therefor. The court below cited a portion of its opinion in *Barrows* v. *Hickel,* 447 F.2d 80 (9th Cir. 1971), which asserted that a showing that an increased market for a mineral was reasonably to be expected was insufficient to constitute a showing of a valid discovery. There, the court concluded that there can only be a valid discovery where "... at the time of discovery, [there is] a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence." *Barrows* v. *Hickel, supra* at 83. While this strict marketability test may well be appropriate to a claim involving sand and gravel, which was the case in *Barrows* v. *Hickel,* it imposes far too inflexible a standard in a case involving metallic minerals essential to a major manufacturing process.

If the decision below is permitted to stand, the *only* means of proving a valid discovery of a valuable mineral deposit will be to prove that the mineral deposits as to which the claim is asserted can be immediately sold at a profit, even though a better market might reasonably be expected by any person of ordinary prudence. It is precisely because common varieties of stone, sand, gravel and the like, are of widespread occurrence that it is reasonable to assume that demand for such materials cannot be expected to exceed supply. The same assumption cannot be made, however, in the case of manganese. Manganese is a metallic

mineral which is scarce domestically and potentially in short supply should the countries now supplying the United States embargo shipments to this country for any reason.

In short, the United States Court of Appeals for the Ninth Circuit, having ignored this Court's opinion in *United States* v. *Coleman,* has thereby improperly extended the principle enunciated in *Coleman* to all mineral deposits, whether metallic or nonmetallic, abundant or potentially in short supply. The Court's unwarranted extension of *Coleman* to metallic minerals and its exclusive use of the marketability test, we submit, is a virtual abandonment of the prudent-man test, is contrary to law, and, as shown below, could have serious consequences adverse to the public interest.

II. THE POTENTIAL ECONOMIC IMPACT OF THE DECISION BELOW IS A MATTER OF IMPORTANT PUBLIC INTEREST.

The decision below precludes discovery in the case of mining claims, validly located and profitably operated in the past, which still contain minerals of the same quality and quantity as formerly mined profitably, where through the passage of time prices have fallen solely due to an influx of foreign imports.

It is undisputed that there is an existing demand for manganese because it is essential to the manufacture of steel. Existing supply currently comes primarily from South American and African countries, which by collective embargo or price setting could at any time alter the market for manganese so that domestic production will again become profitable. Such a result is not unlikely or remote, as recent events in oil and bauxite have demonstrated.

Nevertheless, exclusive application of the strict marketability test adopted by the court below to metallic minerals of domestic, but not international, scarcity will discourage the exploration for the discovery of new deposits of minerals which were formerly and profitably mined, but which are no longer mined domestically because of an influx of foreign imports. Such metals, in this case manganese, remain essential for the productive capacity of this Nation. However, no person confronted with the decision below will be willing to locate further deposits of such minerals against the day when imports are either cut off by foreign countries or domestic supply diminishes to the point of scarcity. Exploration will not be undertaken until there is a profitable domestic market, by which time the need for the minerals in demand will already have arisen and the gap between supply and demand will be unable to be filled.

Application of the decision below makes the validity of mining claims dependent upon fluctuations in market price. The decision below permits the establishment of a valid discovery of valuable mineral deposits only in instances where there is a current market price for the mineral adequate to insure immediate extraction and transportation at a profit. No explorer for valuable mineral deposits will be certain whether his location is valid or whether he should apply for a patent on his claim until he sees each day's published prices for the mineral. He would be less likely to make initial exploration because he could not be sure that today's prices would sustain his future claim if prices temporarily declined. Similarly, he would have no incentive to explore for minerals which are in demand but for which this country is dependent upon

foreign sources. Indeed, if the validity of locations depends upon fluctuations in market price, will these claims which have been disallowed be restored by some future increase in the market price? If not, persons aware of disallowed claims like Petitioner's will be able to reap the fruits of the explorers' efforts when the price increases, while the explorer will be deprived of any benefit.

No prudent man, faced with the practical effects of the decision below, will commence exploration for metallic minerals even though, like manganese, these minerals might be in demand and in domestic short supply. He will not do so even if a profitable market is reasonably to be expected. In normal circumstances a person's prudence is related to the risks he assumes, and one may well be prudent even though engaging in a venture whose success is not completely assured. Prudence and the prudent-man test are necessarily flexible standards calling for the exercise of judgment, but the decision below imposes a single inflexible standard, *i.e.,* whether a mineral deposit can be profitably mined immediately.

The effect of this application of the marketability test to metallic minerals in current domestic, but not foreign, short supply is to discourage exploration for minerals, a result contrary to the purpose and intent of Congress in enacting legislation governing the exploration for minerals on public lands. *United States* v. *Coleman, supra; Heydenfeldt* v. *Daney, supra.* Moreover, it increases United States reliance for essential minerals upon foreign countries at a time when it is apparent that many countries are using their abundant resources to the economic and strategic disadvantage of consumer nations like this country.

The decision below contravenes federal legislation and policy, which for more than one hundred years has encouraged the exploration and development of mineral deposits on federal lands, and runs counter to decisions of this Court construing such legislation. This misapprehension of the law, together with the very real possibilities for economic dislocation in the United States, raises serious federal questions requiring resolution by this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ORDER

(Filed February 1, 1974)

Before: WRIGHT, KILKENNY and WALLACE, Circuit Judges.

The decision of the district court is affirmed for the reasons stated in *United States* v. *Reid Smith, sub. nom. United States* v. *Denison*, 71 I.D. 144 (1964). See also *Barrows* v. *Hickel*, 447 F.2d 80, 83 (CA9 1971).

The consolidation of appellant's hearing with others did not affect his susbtantial rights.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JUDGMENT

(Filed January 31, 1972)

This action came on for (hearing) before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, Granting Defendant's Motion for Summary Judgment,

It is Ordered and Adjudged that the Plaintiff take nothing, and that the action be dismissed on the merits.

Dated at Phoenix, Arizona, this 31st day of January, 1972.

W. J. FURSTENAU
Clerk of Court

By: /s/ DAN J. NERONE
Dan J. Nerone, Deputy

APPENDIX C

UNITED STATES

v.

ALVIS F. DENISON ET AL.

A-29884, etc. Decided April 24, 1964

Mining Claims: Discovery—Mining Claims: Determination of Validity.

Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions.

Mining Claims: Discovery—Mining Claims: Determination of Validity.

Mining claims located for manganese must be declared null and void for lack of a discovery where, although manganese was sold from some of the claims and other claims in the vicinity during World War II and the post-war period when a Government buying program was in existence, the evidence shows that since the end of the buying program in 1959 the price of manganese has dropped 50 percent and sales of domestic manganese have ceased and there is no reasonable prospect of a future market, the need for manganese being supplied by higher grade imported manganese.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20240

A-29884 United States v. Alvis F. Denison	Arizona Contests Nos. 10406-10408, 10426 and 10427, 10507, and 10606
A-29983 United States v. Leo E. Shoup A-30190 United States v. Reid Smith	Lode mining claims declared valid in part and invalid in part
A-30210 United States v. Estate of Robert F. Beecroft	Affirmed in part; reversed in part

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Separate contest proceedings[1] initiated by the United States Forest Service, Department of Agriculture, were

[1] The contest numbers, mineral patent application numbers, and the names of the claims involved are set forth in the appendix by the claimant's name and the appeal numbers listed above, together with a general description of the sections where the claims are located. Also listed in the appendix are the dates of the hearing examiners' decisions, with the action taken therein, and the dates of the decisions of the Assistant Director, Bureau of Land Management, with the action taken on the appeals from the hearing examiners' decisions.

brought against certain lode mining claims located in Coconino County, Arizona, within either the Coconino or Sitgreaves National Forests, following the filing of mineral patent applications for the claims by the locators or their successors in interest. In all the proceedings, the Forest Service charged basically that the claims were invalid because no valid discovery, within the meaning of the mining laws,[2] existed on the claims, and because the lands were nonmineral in character. In the proceedings against Leo E. Shoup's mining claims, a third charge was made that patent was not sought in good faith because the applicant seeks ownership of the land for purposes other than mining. Separate hearings were held on the charges in each case.

In two of the proceedings, those involving claimants Reid Smith and the Estate of Robert F. Beecroft, the hearing examiners dismissed the contests on the ground that the claims were valid. The Assistant Director, Bureau of Land Management, affirmed these actions, finding that there was a discovery as required by the mining laws on each claim. The Forest Service has appealed to the Secretary of the Interior from the Assistant Director's decisions.

In the proceeding involving Leo E. Shoup's mining claims, the hearing examiner found that there was not a valid discovery of a vein or lode in rock in place bearing a valuable mineral deposit and declared the claims to be null and void. On the charge that there was not good faith he ruled that there was no showing that the claimant had not *located* the claims in good faith and therefore evidence which was produced at the hearing showing his intent to sell the claims after patent was obtained was not sufficient ground for invalidating the claims. The Assistant Director affirmed the decision on the first ground but held that it was unnecessary, therefore, to make a ruling on the good faith question. Shoup has appealed to the Secretary from that decision, requesting a reversal or a rehearing.

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[2] Rev. Stat. #2319, 2320, 2325 (1875), 30 U.S.C. ##22, 23, and 29 (1958).

In the proceeding involving Alvis R. Denison's mining claims, the hearing examiner found that none of the claims had mineralization of value or extent as lodes in rock in place, rather than as placers, sufficient to constitute lode discoveries, and rejected Denison's mineral patent applications. The Assistant Director in effect reversed that decision as to the question whether the claims may be considered as lodes or whether they are actually placers and vacated the decision as to four of the sixteen claims involved, finding that there was a valid lode discovery on these claims. However, he affirmed the action of the hearing examiner in declaring the other claims to be null and void for lack of discovery by finding that there was no discovery on them. Both the Forest Service and Denison have appealed from that decision.

All of the claims in these proceedings were located for, and the claimants allege them all to be valuable for, manganese. The Shoup, Smith, and Beecroft claims lie in adjoining townships and the Denison claims are about 40 miles distant. In all of these cases, the Forest Service has raised a central issue as to what criteria should be applied to determine whether there has been a valid discovery. It contends that the Bureau improperly failed to consider present economic conditions in determining whether the mineral deposits on the claims are "valuable" within the meaning of the mining laws and that the Bureau improperly relied only on past economic conditions and hypothetical possibilities in the future. It contends that there is no general market in this country for manganese of the quality and quantity that may be found on these claims, that market conditions are depressed due to the availability of imported manganese of a much higher quality at cheaper prices and the termination of the United States Government's stockpiling program in manganese, with manganese currently being declared in excess quantities in the stockpiles.

The mining claimants object to these contentions. Generally, the claimants allege that manganese is a mineral

having intrinsic value and that therefore marketability need not be shown, citing a Solicitor's opinion of September 20, 1962 (69 I.D. 145), and that the test of discovery as enunciated in the leading case of *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), requires only that a prudent man have a reasonable prospect of success in developing a "valuable" mine and not a "profitable" mine, as contended by the Forest Service.

Although in these cases there does appear to be a diversity in the quality and quantity of manganese present on the claims, which may to a certain extent account for the differences in the rulings of the hearing examiners and the Assistant Director in these cases, there also appears to be some inconsistency in the application of the prudent man test to these cases. Because of the importance of the central issue raised by the Forest Service and similarities in these cases as to the nature of the minerals involved, their disposition, and their commercial usage and marketability, and because several of the witnesses testified in two or more of the hearings,[3] these cases have been consolidated for consideration of the appeals.

The prudent man test, as originally stated in *Castle* v. *Womble, supra,* is:

> "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." (P. 457.)

This test has been quoted or cited with approval by the United States Supreme Court in *Chrisman* v. *Miller,* 197

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[3] Alvis Denison testified for the claimants in all four cases, John Beecroft for the claimants in all but the Denison case, and H. J. Vander Veer for the claimants in the Smith and Beecroft cases. Joseph H. Morgan and Donald J. Morgan were counsel for the claimants in all the cases.

U.S. 313 322 (1905), and other cases, most recently in *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963).

After establishment of the basic rule on discovery, the Department was confronted with situations in which applications for mineral patent were filed for claims which might previously have been valuable for gold but which were not shown to be valuable for gold at the time of the applications for patent. In *United States* v. *Margherita Logomarcini*, 60 I.D. 371 (1949), the Department held that before a patent can be issued it must be shown as a present fact that the claim is valuable for minerals. The Department held to the same effect in *United States* v. *Lem A.* and *Elizabeth D. Houston*, 66 I.D. 161 (1959), pointing out that although a mining claimant need not apply for a patent to his claim he exposes himself to the chance that at some time the conditions on his claim will no longer support the issuance of a patent. Both the *Logomarcini* and the *Houston* decisions were cited for these propositions by the Supreme Court in *Best* v. *Humboldt Mining Co., supra* at 336.

In the *Houston* case, the Department cited as precedent not only the *Logomarcini* case but also the cases of *United States* v. *Pumice Sales Corporation*, A-27573 (July 23, 1959), and *United States* v. *Alonzo A. Adams*, A-27364 (July 1, 1957). The *Pumice* case, unlike the others, involved mining claims located for a mineral of widespread occurrence, pumice. The validity of such claims depends upon an affirmative showing of a present demand or market for the mineral. *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959). In the *Pumice* case it was shown that pumice from one of the claims had been sold and used for commercial purposes in the past but that operations were then shut down and no present demand existed for the pumice. The Department held that although the claims may have been valid in the past they had become invalid

for lack of a discovery. The *Pumice* case did not involve applications for patent.

The *Adams* case involved applications for patent to gold placer claims. The Department held the claims to be null and void for the reason that the evidence showed that the gold values on the claims were so low in comparison to the cost of operations required to recover the gold that a prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of developing a valuable mine. The Department rejected the claimant's contention that more weight should have been given to the evidence of values recovered in the past, saying that it was not sufficient that a valuable discovery may have been made in the past, citing the *Logomarcini* case.

The *Adams* decision was challenged in court but sustained in *Alonzo A. Adams* v. *United States,* 318 F.2d 861 (9th Cir. 1963). The court expressly affirmed the ruling in the *Logomarcini* case.

More recently the same court has rendered another decision which appears to be decisive of the central issue presented in the appeals under consideration. In *Mulkern* v. *Hammitt,* 326 F.2d 896 (1964), the court sustained a decision of the Department holding two mining claims null and void for lack of a valid discovery of gypsum or silica. *United States* v. *G. C. (Tom) Mulkern,* A-27746 (January 19, 1962). The claims, which were located on December 23, 1922, were contested in 1944 and a hearing was held in 1957. The issue was whether during the period from December 23, 1922, to May 15, 1926, or between August 31, 1926, and May 3, 1929, there had been a valid discovery on the claims. The two periods of time were the only times in which the land in the claims was open to mining location. The evidence at the hearing was largely to the effect that at the time of the hearing there was no market for the minerals in the claims. There was only slight evidence as

to marketability prior to May 3, 1929. The Department held the claims to be null and void for lack of a showing of marketability during the two periods of time when the land was open to location.

In the ensuing litigation, the claimant contended that conditions in the 1957 period, when the hearing was held, had no bearing on the issue of discovery; that the testimony as to such conditions was irrelevant; and that the only question was whether, in 1922 and the years immediately thereafter, the situation satisfied the *Castle* v. *Womble* test. The court rejected the contention, saying—

> "The appellant's contention is erroneous. This court, in the recent case of Adams v. United States, 318 F.2d 861, dealt with this very question, and held that even though the mining claim there in litigation would, at one time, have satisfied the test, nevertheless the Government rightfully denied a patent to the claimant since, *because of changed economic conditions,* the claim did not *presently* satisfy the test. The fact that in *Adams* the attack was upon the Government's refusal to issue a patent, while in the instant case the Government was seeking to nullify the appellant's claim as to which he had never requested or received a patent, does not distinguish the *Adams* case from the instant one. The problem in both cases is whether the public lands of the United States should be perpetually incumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, *no longer has a market or a reasonable prospect of a future market;* or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available." (P. 898; emphasis added.)

The *Mulkern* case, then, is clear authority for the proposition that although a mining claim may once have been

valid because it contained a valuable deposit of mineral the claim will become invalid if the mineral deposit loses its value because of changes in economic conditions, such as the loss of a market or transportation facilities. That the ruling is not confined to instances involving minerals of common occurrence, such as pumice, is plain from the court's statement that the *Adams* case decided the same question. That case, of course, dealt with gold.

In the *Adams* case, also, the court ruled that in applying the prudent man rule "evidence as to the cost of extracting the mineral is relevant" and that the Department properly considered evidence on that point with respect to the Adams claims. 318 F.2d at 870. And, years earlier, the Supreme Court had indicated that "the cost of mining, transportation and reduction" was relevant to determining whether a valid discovery had been made. *Cole* v. *Ralph*, 252 U.S. 286, 299 (1920). That case, too, concerned claims located for gold.

Thus, the economic conditions which may be considered in determining whether a valuable mineral deposit has been discovered include such factors as the cost of mining, transporting, and processing the mineral and the existence of a market for the mineral, whether it be deemed one of intrinsic value, such as gold, or one of common occurrence, such as pumice.

In this connection, note should be taken of reference by the parties to the Solicitor's opinion of September 20, 1962, *supra*, on the "Marketability Rule" as applied to the law of discovery. The claimants purport to find comfort in the state[ment] in the opinion that

> "An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability." 69 I.D. at 146.

Claimants state that manganese is an intrinsically valuable mineral and therefore is marketable. This overlooks the

fact, however, that the opinion carefully states that showing the mineral discovered to be an intrinsically valuable one only "*usually* meets the test of marketability" (emphasis added). The opinion otherwise makes it amply clear that the marketability test

> "is in reality applied to all minerals, although it is often mistakenly said to be applied solely to non-metallic minerals of wide occurrence." *Id.*

Thus, it is entirely properly to require the holder of a claim containing a low grade of an intrinsically valuable mineral to show that there is a market or demand for the mineral in the claim.

What does the application of these rules to the four cases under consideration show?

First, the evidence developed at the respective hearings seems to show that deposits of manganese exist on the claims in question and that some of the manganese is of a grade that was mined and sold in the past from patented manganese claims in the same area and from some of the contested claims themselves. The quantity of such manganese in each claim is not clearly established and it is questionable to what extent minable deposits exist on the claims.

Second, the evidence establishes that, except possibly in the case of the Beecroft claim, all sales of manganese were made during World War II and the post-war period to August 5, 1959, when a Government carlot buying program was in effect. Upon termination of the Government program on August 5, 1959, sales of manganese in the area of the claims, and, indeed, of practically all domestically produced manganese, ceased. This apparently was caused by a break in the price of manganese from around $90 per ton to $40-5-per ton.

Third, up to the time of the respective hearings (the last one being held on March 1, 1963, in the Beecroft case), no

further sales of domestic manganese had been made, except possibly in the case of some captive mines owned by steel companies, because no profit could be realized from sales. The market for manganese has been supplied by imported manganese of the same or higher grade.

Fourth, the claims are being held in reserve with the hope and expectation that some day the market will return. However, little basis has been given for this hope or expectation. [4]

In the hearing on the Beecroft claim, it was asserted by the claimant that manganese was sold from the claim up to August 5, 1960, but there is at least a question whether the proper date was not August 5, 1959 (Beecroft Tr. 60).

Considering the evidence as a whole, it seems inescapable that what sales of manganese have been made from some of the claims and from other patented claims in the area were made during a period of national emergency and of a Government price support program which ended on August 5, 1959, and that the manganese on the claims has had no market since that date because of a 50 percent reduction in the market price which makes it unprofitable to mine and sell domestic manganese today. Outside of some speculation about development of a new process for utilizing low grade manganese economically, there is no evidentiary basis for any reasonable expectation that in the reasonably near future high price levels will return which will make it economic to mine the claims. The fact is that manganese has not been sold from the area in recent years and there is

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[4] The evidence referred to up to this point may be found in the transcripts of the various hearings as follows: Denison Tr. 294, 355, 357, 360, 362, 386, 388, 391, 439-441, 455, 456; Shoup Tr. 1 (first hearing) 137, 139, 177, 210, 212, 213; Shoup Tr. II (second hearing) 79, 113-116, 128, 130, 131, 170, 211; Smith Tr. 105, 111, 112, 124, 187, 232-233, 237, 243, 257, 263; Beecroft Tr. 33-37, 51, 57, 60, 61, 75-78, 89-91, 97.

no evidence that sales may reasonably be expected in the future.

In the circumstances, the ruling in the *Mulkern* case is clearly applicable and it must be concluded that the contested claims are null and void for lack of a present discovery of valuable mineral deposits due to changed economic conditions. [5]

This makes it unnecessary to consider other issues raised in the appeals, such as whether the claims were properly located as lode claims instead of as placer claims and whether the Shoup claims are invalid because of bad faith on the part of the claimant.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions of the Assistant Director are affirmed to the extent that they held that some of the contested claims are null and void and reversed to the extent that they held the remaining claims to be valid.

(Signed)
Deputy Solicitor

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[5] The burden is on a mining claimant to show by a preponderance of the evidence that he has a valid mining claim. *Foster* v. *Seaton, supra.* Thus, the claimants had the burden of showing that their manganese deposits were still valuable under current economic conditions. They clearly did not sustain the burden.

APPENDIX

Claimant and Appeal Number	Arizona Contest Numbers and Patent Application Numbers	Name of Lode Claims and General Description of Area of Claims	Date of Hearing Examiner Decision and Action Taken	Date of Assistant Director's Decision and Action Taken
Alvis F. Denison A-29334	Contest No. 10406 Mineral Patent Application 023529, filed October 1, 1959	B.V.D. Nos 1 & 2, Hillerest No. 22 Within sec. 19, T. 11 N., R. 15 E., G.&S.R.M., Arizona	August 23, 1961 Found claims invalid as no valuable mineralization in lodes, rejected patent applications.	October 30, 1962 Vacated decision as to 4 claims (Miss Lottie Nos. 5 & 6, B.V.D. No. 3, Little Pine No. 9), found them valid as lodes, affirmed as to other claims on ground no discovery.
	Contest No. 10407 Mineral Patent Application 021333, filed June 4, 1959	Miss Lottie Nos. 4, 5, & 6, D&W Nos. 3, 4, & 5 Within sec. 14, T. 11 N., R. 14 E., G.&S.R.M., Arizona		
	Contest No. 10408 Mineral Patent Application 021390, filed June 4, 1959	Little Pine Nos. 7, 8, & 9, B.V.D. Nos. 3, 4, & 5, Hillerest No. 23 Within secs. 18 & 19, T. 11 N., R. 15 E., G.&S.R.M., Arizona All within Coconio County and the Sitgreaves National Forest		
Leo E. Shoup A-29983	Contest No. 10426 Mineral Patent Application 024012, filed December 4, 1959	Manganese Nos. 3, 4, & 5, Black Diamond Nos. 1* & 2 (*No. 1 was relinquished by the claimant, on May 15, 1962, and is not involved in the appeal)	February 28, 1962 Found claims invalid for lack of discovery of valuable mineral in lodes, rejected patent applications.	February 15, 1963 Affirmed.

		Within secs, 19, 20, 29, & 30, T. 14 N., R. 10 E., G.&S.R.M., Ariz.		
	Contest No. 10427 Mineral Patent Application 024013, filed December 4, 1959	Manganese Nos. 9 & 10 Within sec. 20, T. 14 N., R. 10 E., G.&S.R.M., Arizona		
		All within Coconino County and the Coconino National Forest		
Reid Smith A-30190	Contest No. 10507 Mineral Patent Application 30459, filed March 6, 1961	Sunset Nos. 1-16, inc. Within secs. 13 & 24, T. 14 N., R. 9 E., and secs. 18 & 19, T. 14 N., R. 10 E., G.&S.R.M., Arizona	February 20, 1963 Found claims valid, dismissed contest.	October 23, 1963 Affirmed.
		All within Coconino County National Forest		
Estate of Robert F. Beecroft A-30210	Contest No. 10560 Mineral Patent Application 030188, filed January 26, 1961	Rough Hill #1 Lode Within sec. 30, T. 14 N., R. 10 E., G.&S.R.M., Arizona	June 7, 1963 Found claims valid, dismissed contest.	November 6, 1963 Affirmed.
		Coconino County, Coconino Forest		

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1806

REID SMITH, PETITIONER

v.

ROGERS C. B. MORTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner sought to patent sixteen mining claims under 30 U.S.C. 29. The claims were located in the Long Valley Mining District of Arizona and petitioner's application for patents alleged the discovery of valuable deposits of manganese, a mineral used in the production of steel. The Bureau of Land Management contested petitioner's claims on the ground, *inter alia*, that there was no valid discovery within the meaning of the mining laws.

After hearings on petitioner's claims, the Department of the Interior Hearing Examiner found for petitioner and dismissed the contest. The Hearing Examiner's decision was affirmed by the Director of the Bureau of Land Management. On appeal the Deputy Solicitor of the Department of the Interior reversed the decision of the Hearing Examiner, finding that the market for domestic

manganese was depressed by imports[1] and, therefore, that petitioner had not made a discovery of a "valuable" mineral deposit as required by 30 U.S.C. 29 (Pet. App. C).

Petitioner brought suit against the Secretary of the Interior to set aside the decision. The district court granted the Secretary's motion for summary judgment and dismissed the complaint (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Petitioner's sole contention — that the court of appeals erred in approving the application of a "marketability" test in determining whether a claim was based on discovery of valuable mineral deposits — is without merit.[2] The decision of the court of appeals is consistent with its prior decisions (*e.g.*, *Barrows* v. *Hickel*, 447 F. 2d 80; *Mulkern* v. *Hammitt*, 326 F. 2d 897; *Adams* v. *United States*, 318 F. 2d 861), and with this Court's opinion in *United States* v. *Coleman*, 390 U.S. 599.[3] There is thus no occasion for further review by this Court.

As this Court noted in *United States* v. *Coleman*, *supra*, 390 U.S. at 602, "[u]nder the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and

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[1]The Deputy Solicitor found that "manganese has not been sold form the area in recent years and there is no evidence that sales may reasonably be expected in the future" (Pet. App. C, 12a-13a).

[2]Petitioner concedes that present market conditions do not permit the profitable mining of manganese (Pet. 11).

[3]Petitioner's contention that *Coleman* applies only to nonmetallic mineral deposits (Pet. 9, 11) is erroneous. This Court expressly indicated that marketability is a factor to be considered in metallic mineral deposits, although ordinarily such minerals are economically valuable. 390 U.S. at 603.

not for other purposes." It would be contrary to the purpose of the mining laws to permit the issuance of patents on the basis of possible future value since to do so would allow portions of the public domain to be obtained by private interests solely for speculation.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

DOJ-1974-09